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No. 91-517

In The

Supreme Court of the United States

October Term, 1991

FRANK FORREST, et al.,

Petitioners,

v.

WASHINGTON STATE ELECTRICAL CONTRACTORS ASSOCIATION, INC., a Washington corporation, et al.,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONERS' REPLY BRIEF

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INTRODUCTION

Respondents' Brief in Opposition concedes that a clear basis exists for granting the State of Washington's petition. Respondents ("the Contractors") agree that the Panel decision applies a subjective motivation test for state agent status. Respondent's Brief in Opposition to Petition for Writ of Certiorari, p. 14 ("Opposition Brief") ("[T]he Court of Appeals correctly examined the potential motives of the Council members.") Thus, that critical issue is squarely presented in this case and is ripe for determination.

Respondents do not even attempt to reconcile the conflicting and inconsistent decisions on this issue in other circuits. Moreover, the Contractors fail to present a single case that agrees with, or supports, the Panel decision's subjective motivation test.

Instead of addressing the question of whether this Court should review the decision below in order to clarify the appropriate legal standards in this important area, the Contractors simply argue that the Ninth Circuit's use of the subjective motivation test was correct. This argument misses the mark. The argument also rests entirely on fact contentions that are directly contradicted by the findings of fact entered by the trial court and not challenged on appeal.

CORRECTION TO RESPONDENTS' STATEMENT OF THE CASE

The Contractors' contention that Council members serve private, not public, interests is contradicted by

unchallenged trial court findings. Appendix B, Petition for a Writ of Certiorari to the Court of Appeals for the Ninth Circuit, at 8a-10a (Finding 2: "The wage-parity rule was designed in furtherance of a clearly articulated and affirmatively expressed state policy." Finding 10: "there is no danger that Council members are engaged in a private arrangement in conflict with state apprenticeship policy.") The Contractors did not challenge these findings and the Panel did not overturn them. *See Fed. R. Civ. P. 52(a)* ("Findings of fact . . . shall not be set aside unless clearly erroneous.")

In making findings of fact, the district court considered, and rejected, the fact contentions now presented to this Court by the Contractors. If review is accepted, the Court will not be presented with a factual dispute. The factual record that would be presented to this Court would be limited to the unchallenged findings below. The Contractors' references to rejected factual contentions are inappropriate here and should be disregarded by the Court.

The Contractors also misrepresent the effect of the rule they challenge, apparently in an effort to portray this as a union versus non-union dispute. Contrary to the Contractors' repeated claims, the challenged rule does not compel them to pay "union wages." Opposition Brief at 3, 5, and 9. Instead, the current rule requires that apprentice wage standards be based on a wage that is no lower than 80 percent of prevailing journey-level wages, as determined by the state labor statistician. The prevailing wage for individual trades is influenced by both union and non-union wage levels.

REPLY TO THE BRIEF IN OPPOSITION

The Contractors claim that the question of whether adequate procedural and political safeguards exist in this case is not ripe for determination by this Court. Instead, they advocate returning the case to the trial court to apply the *Patrick v. Burget* two-prong test. Opposition Brief at 11. That approach would be futile. Under the Panel decision and *Patrick*, the trial court will not have discretion to accept state supervision that does not include state official override power. The question of what level of supervision is needed for state board immunity is squarely presented and is ripe for determination by this Court.

The Contractors argue that no state policy supports the Council's adoption of the challenged rule. Opposition Brief at 15-17. To the contrary, state statutes specifically designate apprentice wages as subject to Council regulation. *Wash. Rev. Code § 49.04.010* ("The [Council] . . . shall . . . [e]stablish standards for apprenticeship agreements . . . .") and *Wash. Rev. Code § 49.04.050(5)* ("Standards of apprenticeship agreements are as follows: . . . [a] statement of the progressively increasing scale of wages to be paid the apprentice.")

The Contractors' reference to preemption of the challenged rule under the National Labor Relations Act and the Employer Retirement Income Security Act is bewildering. Opposition Brief at 16. Those issues have never before been raised in this case, the Panel did not address them and they are premature. The ultimate validity of the rule will not be at issue here if review is granted.

CONCLUSION

The critical issues of state action antitrust immunity for state regulatory boards, like the Council, are squarely presented in this case and are ripe for decision. Supreme Court guidance in this important area will eliminate the confusion and uncertainty that currently exists, as reflected in the Panel decision. The State of Washington's petition for certiorari should be granted.

Respectfully submitted,

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